APPENDIX I

RELEVANT U.S. CONSTITUTIONAL PROVISIONS

Article VI, Section 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment I

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV, Section 1

[N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES STATUTES

28 U.S.C. § 1257

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

28 U.S.C. § 1331

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343

§ 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by

any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section—

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. § 1651

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

42 U.S.C. § 1974

§ 1974. Retention and preservation of records and papers by officers of elections; deposit with custodian; penalty for violation

Every officer of election shall retain and preserve, for a period of twenty-two months from the date of any general, special, or primary election of which candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico are voted for, all records and papers which come into his possession relating to any application, registration, payment of poll tax, or other act requisite to voting in such election, except that, when required by law, such records and papers may be delivered to another officer of election and except that, if a State or the Commonwealth of Puerto Rico designates a custodian to retain and preserve these records and papers at a specified place, then such records and papers may be deposited with such custodian, and the duty to retain and preserve any record or paper so deposited shall devolve upon such custodian. Any officer of election or custodian who willfully fails to comply with this section shall be fined not more than $1,000 or imprisoned not more than one year, or both.

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

RELEVANT ALABAMA CONSTITUTIONAL PROVISIONS

Amend. No. 328

CONSTITUTION OF ALABAMA OF 1901

6.02. The supreme court.

(a) The supreme court shall be the highest court of the state and shall consist of one chief justice and such number of associate justices as may be prescribed by law.

(b) The supreme court shall have original jurisdiction (1) of cases and controversies as provided by this Constitution, (2) to issue such remedial writs or orders as may be necessary to give it general supervision and control of courts of inferior jurisdiction, and (3) to answer questions of state law certified by a court of the United States.

(c) The supreme court shall have such appellate jurisdiction as may be provided by law.

RELEVANT ALABAMA STATUTES

§ 12-2-14. Appointment of members of bar to sit as special judges in determination of certain cases.

When by reason of disqualification the number of judges competent to sit in a case is reduced to eight or to six and there is equal division among them on any question material to the determination of the case, the fact shall be certified by the chief justice or, when he is disqualified, by the judges sitting to the governor, who shall thereupon appoint a member of the bar of the supreme court to sit as a judge of said court in the determination of said case. Similarly, when by reason of disqualification no one of the judges is competent to sit in a case or the number is reduced below six, the fact shall be certified by the chief justice, if he is competent to sit, or, if not, by the judge or judges sitting, or, if no one is competent, by the clerk of the court to the governor, who shall thereupon appoint members of the bar of the supreme court to constitute a special court of seven members for the consideration and determination of such case.

The word "disqualification," as used in this section, shall include inability to sit by reason of prolonged illness of a chronic nature.

§ 17-10-7. Form of affidavit to be printed on envelope — General, special or municipal elections.

Each absentee ballot shall be accompanied by an envelope upon which shall be printed an affidavit. This affidavit which shall be used in general, special or municipal elections shall be substantially as follows:

"State of Alabama

"County of . . . . . .

"I, the undersigned, do swear (or affirm) that:

"(1) I am a resident of . . . . . county in the state of Alabama.

"(2) My place of residence in Alabama is:

. . . . . .

(street)

. . . . . ., Alabama . . . . . .

(city or town) (zip code)

"(3) My voting precinct (or place where I vote) is:

. . . . . .

"(4) My date of birth is: . . . . . .

month day year

"(5) I am entitled to vote an absentee ballot because:

"Check only one:

_____ I have moved from Alabama less than thirty days prior to the election.

_____ I will be out of the county or the state on election day.

_____ I am physically incapacitated and will not be able to vote in person on election day.

"I further swear (or affirm) that I have not voted nor will I vote in person in the election to which this ballot pertains.

"I have marked the enclosed absentee ballot voluntarily and that I have read or had read to me and understand the instructions accompanying this ballot and that I have carefully complied with such instructions.

"Moreover, I further swear (or affirm) that all of the information given above is true and correct to the best of my knowledge and that I understand that by knowingly giving false information so as to vote illegally by absentee ballot that I shall be guilty of a misdemeanor which is punishable by a fine not to exceed $1,000.00 and/or confinement in the county jail for not more than six months.

. . . . . .

(Signature or mark of voter.)

"Note: Your signature must be witnessed by either: A notary public or other officer authorized to acknowledge oaths or two witnesses 18 years of age or older.

"Sworn to and subscribed before me this . . . . . day of . . . . . , 19. . . I certify that the affiant is known (or made known) to me to be the identical party he claims to be.

. . . . . (Signature of official)

(Title of official)

. . . . . .

(Address of official)

OR

"1st Witness . . . . . .

Signature

. . . . . .

Print name

. . . . . .

Address

. . . . . .

City Zip Code

"2nd Witness . . . . . .

Signature

. . . . . .

Print name

. . . . . .

Address

. . . . . .

City Zip Code

§ 17-10-9. Two envelopes to be furnished with ballot; form thereof; delivery of ballot to absentee election manager.

Each prospective absentee voter who meets the requirements of this chapter shall be furnished with the absentee ballot herein provided for, together with two envelopes for returning his marked ballot. One envelope shall be a plain envelope in which the ballot shall be sealed by the voter after he has marked it.

The second envelope shall have the voter's affidavit printed on the back and shall be large enough to seal the plain ballot envelope inside. The second envelope shall also be a return mail envelope.

Such return mail envelope shall be addressed on the front to the absentee election manager and shall be endorsed on the left-hand upper corner thereof substantially as follows:

"Absent Voter's Ballot. State, County, Municipal, General, Primary or Special Election (as the case may be) to be held on the . . . . . day of . . . . . ., 19. . . From . . . . . (name of voter), precinct or districts . . . . ., County of . . . . ., Alabama."

After marking the ballot and subscribing the oath herein required, the voter shall seal his ballot in the plain envelope, place that plain envelope inside the affidavit envelope, complete the affidavit, and shall forward it by United States mail to the addressee or shall hand it to him in person.

§ 17-10-10. Procedure upon receipt of ballot by absentee election manager; counting of ballots.

Upon receipt of the absentee ballot, the absentee election manager shall record its receipt thereof on the absentee list as provided in section 17-10-5 and shall safely keep the ballot without breaking the seal of the affidavit envelope. On the day of the election, beginning at 12:00

Noon, the absentee election manager shall deliver the sealed affidavit envelopes containing absentee ballots to the election officials provided for in section 17-10-11, and such election officials shall call the name of each voter casting an absentee ballot with poll watchers present as may be provided under the laws of Alabama and shall open each affidavit envelope, review the affidavit to certify that such voter is entitled to vote and deposit the plain envelope containing the absentee ballot into a sealed ballot box. The absentee ballots shall upon the closing of the polls be counted and otherwise handled in all respects as if the said absentee voter were present and voting in person. As regards municipalities with populations of less than 10,000, in the case of municipal elections held at a time different from a primary or general election, such return mail envelopes containing the ballots shall be delivered to the election official of the precinct of the respective voters.

§ 17-14-20. Canvass of election returns by state officials.

All returns of elections required by law to be sent to the secretary of state must, within 15 days after an election, be opened and counted in the presence of the governor, secretary of state and attorney general, or two of them.

§ 17-15-6. Jurisdiction denied judges or courts exercising chancery powers in election contests; appeal.

No jurisdiction exists in or shall be exercised by any judge, court or officer exercising chancery powers to entertain any proceeding for ascertaining the legality, conduct or results of any election, except so far as authority to do so shall be specially and specifically enumerated and set down by statute; and any injunction, process or order from any judge, court or officer in the exercise of

chancery powers, whereby the results of any election are sought to be inquired into, questioned or affected, or whereby any certificate of election is sought to be inquired into or questioned, save as may be specially and specifically enumerated and set down by statute, shall be null and void and shall not be enforced by nay officer or obeyed by any person; and should any judge or other officer hereafter undertake to fine or in any wise deal with any person for disobeying any such prohibited injunction, process or order, such attempt shall be null and void, and an appeal shall lie forthwith therefrom to the supreme court then sitting, or next to sit, without bond, and such proceedings shall be suspended by force of such appeal; and the notice to be given of such appeal shall be 14 days.

§ 17-15-50. Statement — Filing; bond.

When any elector shall choose to contest any election for the office of governor, secretary of state, auditor, treasurer, attorney general, commissioner of agriculture and industries, justices of the supreme court or judges of the courts of appeals, he must, within 10 days after the speaker of the house of representatives shall have opened the returns and proclaimed the results of the election for governor, secretary of state, auditor, treasurer and attorney general, as provided in this chapter, file with the speaker of the house of representatives a written statement of the grounds of such contest and a bond with good and sufficient sureties payable to the state of Alabama and conditioned for the payment of such costs as may accrue upon such contest in the event such contest shall result in favor of the contestee. Such bond must be in the sum of $5,000.00 and must be subject to the approval of the speaker of the house, and such bond, when it shall be approved, shall be filed and recorded in the office of the secretary of state.

RELEVANT ALABAMA RULES OF COURT
ALABAMA RULES OF APPELLATE PROCEDURE

Rule 18.
Certified questions from federal courts.

(a) *When certified.* When it shall appear to a court of the United States that there are involved in any proceeding before it questions or propositions of law of this state which are determinative of said cause and that there are no clear controlling precedents in the decisions of the supreme court of this state, such federal court may certify such questions or propositions of law of this state to the supreme court of Alabama for instructions concerning such questions or propositions of state law, which certified questions the supreme court of this state, by written opinion, may answer.

APPENDIX II

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

RALPH E. BRADFORD, SR., individually as an African-American citizen of the State of Alabama, and on behalf of all other African-American citizens of the State of Alabama similarly situated;	)	
PLAINTIFF,	)	CV 94-PT-2816-M
v.	)	
THE STATE OF ALABAMA; JAMES BENNETT, in his official capacity as Secretary of State for the State of Alabama; BOBBY JUNKINS, in his official capacity as Probate Judge of Etowah County, Alabama; JAMES HAYES, in his official capacity as Sheriff of Etowah County; BILLY S. YATES, in his official capacity as Circuit Clerk of Etowah County, Alabama,	)	
DEFENDANTS,	)	
MICHAEL LEWIS ODOM and JOHN W. DAVIS,	)	
INTERVENORS-DEFENDANTS.	)	

MEMORANDUM OPINION

As the judge to whom this case was initially assigned, and as the sole judge who issued the temporary restraining order, as amended, which was issued on November 18, 1994, this judge further addresses his reasons for voting to dissolve the temporary restraining order and to deny the application for preliminary injunction. This judge makes no suggestion that his opinion is or is not that of the other two judges assigned to the three judge panel by the Chief Judge of the Eleventh Circuit Court of Appeals.[1]

There may be some misunderstanding as to the role of this court. The sole issue before this court on November 18, 1994 was framed by the plaintiff(s)' complaint wherein it was alleged that,

> The order of the Circuit Court of Montgomery County, Alabama hereinabove described brought about and will bring about changes to the voting standards, practices, or procedures in place on the effective date of the Voting Rights Act of 1965 affecting the election of candidates for office in Alabama which were required to be precleared under Section 5 of the Voting Rights Act of 1965.
>
> The execution and implementation [of] said orders without first obtaining the approval of the United States Attorney General violate Section 5

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[1]As this judge made plain at the hearing on November 22, the decision of this court to dissolve its own restraining order had no effect on, nor did it conflict with, the ruling of any other court, state or federal. The three-judge panel in this case sat as a trial court, not an appellate court. To this judge's knowledge the action in this case was the only pending case which addressed § 5 of the Voting Rights Act. That was the only federal law addressed by this court. The attorneys, of course, were well aware of the foregoing. Their clients should have had no misunderstanding.

of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c.

On November 18, 1994, this judge preliminarily concluded that the order of the Circuit Court of Montgomery County, Alabama clearly brought about and will bring about changes to voting standards, practices or procedures. With regard to absentee ballot affidavits, § 17-10-7, provides "Your signature *must* be witnessed be either: A notary public or other officer authorized to acknowledge oaths or two witnesses 18 years of age or older." (emphasis added).[2] This court respectfully disagrees with a conclusion that an "affidavit" which does not include either of the prescribed attestations "substantially complies" with the statute. Further, this judge does not agree that *Williams v. Lide*, 628 So. 2d 531 (Ala. 1993) so holds. Further, there was no evidence that *Williams v. Lide* itself had been precleared prior to November 8, 1994.

This judge, having determined that the Montgomery County Circuit Court order constituted, in midstream, a change in voting procedures, had only one other issue to address on November 18, 1994. That issue was whether, at the time of the filing of this action, approval of the change had been obtained from the United States Attorney General. It is undisputed that, at that time, it had not been. Based on these two findings and conclusions, this judge issued the final temporary restraining order, as amended, after notice and hearing. The court set November 22, 1994 as a date for the three judge panel to consider the application for preliminary injunction. See 28 U.S.C. § 2284(b)(3).

Early in the morning of November 22, 1994, the Office of the Attorney General of the United States issued a letter which purportedly stated that the Attorney General interposed no objection to the change created by the

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[2]It is not clear who represented the voters of Alabama in said case. Of course, the same question might be asked concerning this case.

order of the Circuit Court of Montgomery County, Alabama. The letter did not specifically mention the order of said state circuit court. Neither did the letter refer to any basis for a determination that the change is free of discriminatory purpose and effect or that such a decision had been specifically made.[3] Apparently, this "determination" was made quickly and in a conclusory fashion, based upon "evidence" from sources of which this court is unaware. This court can quickly think of several possible reasons for concluding that the change is not free of discriminatory purpose and effect. First, the change was made in midstream after a preliminary count had been completed and reported to the Secretary of State of Alabama. Such a "wait and see" approach could clearly suggest discriminatory purpose and effect. Second, the new rule, having been announced *after* the election, was patently discriminatory as to those potential voters who may have felt that they would have to comply with the seemingly stringent requirements of § 17-10-7 in order to vote an absentee ballot.

It is undisputed that the current instructions of the Secretary of State and an earlier opinion of the Attorney General of Alabama had clearly required compliance with the notary or witness provision of § 17-10-7.[4] The

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[3]28 CFR Ch 1 (7-1-94 Edition) Subpart F, which prescribes the standards applicable to "Determinations by the Attorney General" includes the following at § 51.52(c).

> (c) *Objection.* An objection shall be interposed to a submitted change if the Attorney General is unable to determine that the change is free of discriminatory purpose and effect. This includes those situations where the evidence as to the purpose or effect of the change is conflicting and the Attorney General is unable to determine that the change is free of discriminatory purpose and effect.

[4]*See* Henderson v. Graddick, 641 F. Supp. 1192 (M.D. Ala. 1986) for a discussion of the effect of action of the Attorney General of the State of Alabama with regard to election procedures.

foregoing, coupled with the common knowledge that absentee ballots have been historically an area fraught with the potential for fraudulent abuse, suggests the potential for discrimination. The cases which this judge has read suggest that the purpose of the subject statutory provisions is to protect the integrity of the ballot. It is obvious that the lack of such a requirement lends itself to misleading, intimidation, or even forgery.[5] The legislative desire to protect the integrity of such ballots is commendable.

Notwithstanding the foregoing, this court is bound by the "determination" of the United States Justice Department which some, perhaps, would commend for its prompt action.[6] In *Morris v. Gressette*, 432 U.S. 491, 507 (1977), the United Supreme Court stated,

> Where the discriminatory character of an enactment is not detected upon review by the Attorney General, it can be challenged in traditional constitutional litigation. But it cannot be questioned in a suit seeking judicial review of the Attorney General's exercise of discrimination under §5, or [her] failure to object within the statutory period.

Further,

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[5] Plaintiff(s)' First Amended Complaint has an attached statement from a voter who says that she was not allowed to vote personally in the November 8, 1994 election because she "had already voted absentee." The declarant states that she had not voted absentee. There are other declarations concerning voting by dead people, non-residents, etc.

[6] The response of the Office of the Attorney General to the court's request for clarification removed doubt as to the intent of that Office. Curiously, the initial letter suggests that possible previous non-precleared violations, on a county by county basis, of the apparently precleared Alabama statute created a situation whereby present adherence to the statute would have to be precleared.

> For the reasons stated in the text, we think Congress intended to preclude all judicial review of the Attorney General's exercise of discretion or failure to act.

Id. 432 U.S. at 507, n. 24.[7]

The § 5 determination of the Attorney General having been received, this judge had no choice other than to vote to dissolve the temporary restraining order. Regardless of whether this judge may be personally repulsed by the circumstances pertinent to this case, this judge's respect for the law as an institution prohibits his abusing his authority even in an attempt to remedy other per-

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[7]In dissent, Justice Marshall (Justice Brennan concurring) stated,

> Under the Court's ruling, it matters not whether the Attorney General fails to object because he misunderstands his legal duty, as in this case; because he loses the submission; or because he seeks to subvert the Voting Rights Act. Indeed, the Court today grants unreviewable discretion to a future Attorney General to bargain acquiescence in a discriminatory change in a covered State's voting laws in return for the State's electoral votes. Cf. J. Randall & D Donald, The Civil War and Reconstruction 678-701 (2d ed. 1961) (settlement of the election of 1876).
>
> Common sense proclaims the error of this result. It is simply implausible that Congress, which devoted unusual attention to this Act in recognition of its stringency and importance, see *South Carolina v. Katzenbach,* 383 U.S. 301-09 . . . (1966), intended to allow the Act's primary enforcement mechanism to be vitiated at the whim of an Attorney General. Legal analysis supports the conclusion that Congress did no such thing. But today, the majority puts aside both common sense and legal analysis, relying instead on fiat. I dissent.

(footnote omitted). *Id.*, 432 U.S. at 507.
Justice Hugo Black's dissent in *South Carolina v. Katzenbach,* 383 U.S. 301, 355-362 (1966) also questioned the delegation of such authority to the Attorney General of the United States under § 5.

ceived abuses.[8] A Justice of the Supreme Court of the United States recently expressed his concern about the deterioration of the law as an institution. This judge will not contribute to any such decline.

This 25th day of November, 1994.

/s/ Robert B. Propst

ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

[8] This court has neither officially approved nor officially disapproved the determination of the Attorney General of the United States nor the order or ruling of any other court, state or federal.

Supreme Court, U.S.
FILED
SEP 11 1995
OFFICE OF THE CLERK

NO. 95-64

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

JOHN DAVIS, on behalf of himself and all others similarly situated,

Petitioners,

v.

STATE OF ALABAMA, PERRY O. HOOPER, SR., LARRY ROE, JAMES D. MARTIN, AND ALL ALABAMA PROBATE JUDGES, SHERIFFS, AND COUNTY CLERKS IN THEIR OFFICIAL CAPACITIES, et al.,

Respondents.

RESPONSE TO SUGGESTION OF DEATH AND MOTION TO SUBSTITUTE CLASS REPRESENTATIVE

Russell Jackson Drake
Drake & Pierce
1509 University Blvd.
Tuscaloosa, AL 35403
(205) 759-1284

M. Clay Alspaugh
Hogan, Smith & Alspaugh, P.C.
2323 Second Avenue North
Birmingham, AL 35203
(205) 324-5635

Joe R. Whatley, Jr.
Counsel of Record

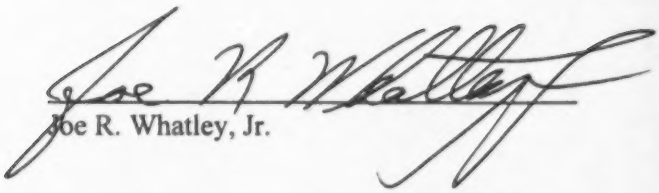
Sam Heldman
Cooper, Mitch, Crawford, Kuykendall & Whatley
505 20th Street North
1100 Financial Center
Birmingham, AL 35203
(205) 328-9576

RESPONSE TO SUGGESTION OF DEATH
AND MOTION TO SUBSTITUTE CLASS REPRESENTATIVE

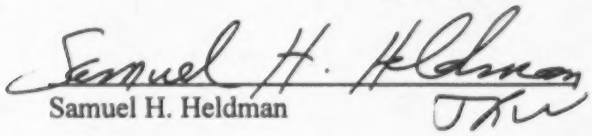
The class of voters disenfranchised by the lower courts' orders submits this response to the Suggestion of Death of the class's representative. The petition for writ of certiorari was filed on behalf of John Davis, the named representative of a then-putative defendant class, on behalf of himself and the class as a representative of whom he was sued. Although the class had not been formally certified prior to the filing of this Petition for Certiorari, this case had even prior to that time been treated as a defendant class action by the lower courts. See, e.g., Roe v. Alabama, 52 F.3d 300, 303 (11th Cir. 1995) (referring to "Davis class").

A suggestion of death has been filed with respect to Davis. Pursuant to Rule 35, Clarence T. Hellums moves to substitute as the named class representative for the petitioner class previously represented by John Davis. The class consists of registered absentee voters in Alabama, whose votes are being challenged in the courts below. Hellums is, and at all times has been, a member of the petitioning class. In the November 1994 general election, he was a fully registered and qualified voter. He attempted to cast an absentee ballot. Through inadvertence, his secretary failed to notarize the absentee ballot affidavit, and as a result of a preliminary injunction issued by the district court, and affirmed as modified by the Court of Appeals, his vote has not been counted, even though the Supreme Court of Alabama has ruled that his ballot and affidavit (and those like his) satisfy the state absentee ballot law. As shown by the attached order, the district court has granted Hellums' motion to substitute for Davis and has now formally certified the class that is petitioning this Court. Under these circumstances, this Court should likewise substitute Hellums for Davis and consider the petition for writ of certiorari on its merits.

Respectfully submitted,



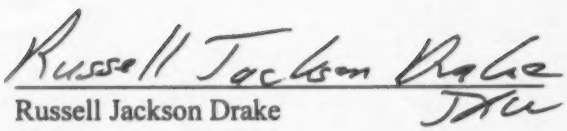
Joe R. Whatley, Jr.



Samuel H. Heldman

OF COUNSEL:

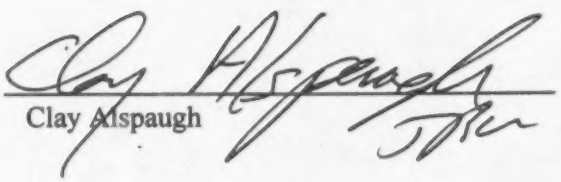
COOPER, MITCH, CRAWFORD,
KUYKENDALL & WHATLEY
1100 Financial Center
505 North 20th Street
Birmingham, AL 35203
(205) 328-9576



Russell Jackson Drake

OF COUNSEL:

DRAKE & PIERCE
1509 University Blvd.
Tuscaloosa, Al 35403
(205) 759-1234



Clay Alspaugh

OF COUNSEL:

Hogan, Smith & Alspaugh
2323 Second Avenue North
Birmingham, AL 35203
(205) 324-5635

Bruce McKee
Hare, Wynn, Newell & Newton
Massey Bldg., Suite 800
290 21st Street North
Birmingham, AL 35203
(205) 328-5330

U.S. DIST. COURT
AUG 23 8 37 AM '95
FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LARRY ROE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**CIVIL ACTION NO. 94-0885-AH-S**
	)	
STATE OF ALABAMA, et al.,	)	
	)	
Defendants.	)	

ORDER

This matter is before the Court on the "Motion Regarding Substitution of Defendant Class Representative" [Doc. #230] and Supplement to said Motion [Doc. #237] and the "Motion to Substitute Clarence T. Hellums, Jr. as a Class Representative for the Previously Designated Davis Class and to Certify Class" [Doc. #240] filed by the counsel for the previously designated Davis Class (hereinafter "Davis Class Defendant"), Plaintiffs' Withdrawal of Motion for Certification of Defendant Class [Doc. #232], the "Motion to Strike Answer of Defendant John Davis and All Subsequent Pleadings, Motions, Responses, Briefs, Objections, Notices, Disclosures, Etc." [Doc. #233] filed by Plaintiffs, and the Motion to Dismiss Cross Claim [Doc. #235] filed by Defendant State of Alabama. The Court ordered all parties to submit briefs addressing the issues raised by the death of Defendant Davis as representative of a putative class and Defendant's Motion to Substitute. The Court has considered the Briefs submitted by the Davis Class, the State of Alabama, and the Plaintiffs. After such consideration, the Court **GRANTS** the Motion to Substitute Clarence T. Hellums, Jr. and **CERTIFIES** the Defendant Class of approximately 1700 voters whose absentee ballot votes were not counted because the affidavit accompanying the ballot

did not contain notarization or the signatures of two witnesses. Mr. Hellums is the named representative of the Defendant class. The Court **DIRECTS** the Clerk of Court to substitute the name Clarence T. Hellums, Jr. for John Davis in the style of this action. Defendant's earlier Motion to Substitute [Doc. #230] is **MOOT**. The Court **DENIES** Plaintiffs' Motion to Strike [Doc. #233] and Defendant State of Alabama's Motion to Dismiss [Doc. #235].

I. BACKGROUND

Plaintiffs named John Davis as a Defendant on November 28, 1994, because he had obtained a court order from the Circuit Court of Montgomery County in the case of *Odom v. Bennett*, NO. 94-2434-R (Montgomery County Cir.Ct., filed Nov. 16, 1994). On August 4, 1995, Plaintiffs moved for Class Certification of Defendant Davis Class on behalf of persons who cast unnotarized or unwitnessed absentee ballots. However, prior to August 4, 1995, Defendant Davis Class has been treated as a class by this Court and by the United States Court of Appeals for the Eleventh Circuit. Defendant Davis has filed Cross-Claims against the State of Alabama alleging violation of the due process clause and the equal protection clause of the United States Constitution and the Voting Rights Act because of the refusal to count the unwitnessed, unnotarized ballots.

Plaintiffs and the State of Alabama both filed suggestion of death of Defendant John Davis on August 17, 1995. [Docs. #27 and 28]. The Alabama Certificate of Death for John W. Davis shows that Mr. Davis died on December 20, 1994. However, apparently counsel for Defendant Davis Class did not learn of his death until approximately August 15, 1995, as the first reference of his death came in a footnote in a Mandamus response filed in the Eleventh Circuit. Upon learning of Davis's death Plaintiff filed a Notice of Withdrawal of their Motion for Class

Certification of such Defendant class. [Doc. #232].

II. RULING

Neither the Court, nor any party has been able to find authority for the scenario presented by this action. Therefore, the Court finds itself in the awkward position of having to make a ruling without guide from precedence. However, the Court believes and so holds that the only way to reach a just result in this action is with the inclusion of the Davis Class. The Davis Class presents the only opposition to the claims of the Plaintiffs. The Court holds that the most reasonable way to answer the question posed by the Eleventh Circuit in *Roe v. Mobile County Appointing Board v. State of Alabama by and through Evans*, 52 F.3d 300 (11th Cir. 1995) is to include the Davis Class as Defendant/Cross-Claimant in this action.

Plaintiffs argue that the Davis Class should be dismissed from this action and that any relief, if meritorious, could be achieved in a post-judgment action.[1] The State of Alabama agrees with the Court that the Davis Class is necessary to the just resolution of this action, but argues that Davis should not be allowed to substitute a class representative for a defendant class and instead should be required to filed a motion to intervene as a plaintiff class pursuant to Fed. R. Civ. P. 24. The Court **GRANTS** the Motion to Substitute Mr. Hellums as the representative of the former Davis Class. The Court makes such a ruling for the following reasons:

1. Although, Plaintiffs and Defendant State of Alabama, may be correct in asserting that

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[1]Plainitiffs argue in their Memorandum that the Motion to Substitute should be denied. Plaintiffs state that they are willing to depose Mr. Hellums and if Plaintiffs believe he is a proper representative Plaintiffs will name him as a defendant. However, this litigation has already been delayed long enough. The case is set for trial on its merits on September 19, 1995 and the Court is of the opinion that its decision with respect to the substitution of Mr. Hellums should not be further delayed.

only a Plaintiff may move to substitute a representative of a *defendant* class, the Court finds that this action can be distinguished from the usual class action litigation. First, Plaintiffs amended their Complaint to add the Davis Class and from that point onward this Court and the Eleventh Circuit has treated Davis as a class. This Court granted a preliminary injunction that the State of Alabama and Davis appealed. The Eleventh Circuit certified a question to the Supreme Court of Alabama and then remanded the action to this Court. Therefore, the issues of class certification did not arise until almost six months after Plaintiffs' filed their original complaint when Plaintiffs moved for certification of the Davis Class. Plaintiffs withdrew the Motion upon learning of the death of Mr. Davis. Plaintiffs stated in their withdrawal that "the announcement of the death of Davis precludes the existence of any interests which can stop the entry of judgment, or otherwise oppose the relief sought by the plaintiffs." *See* Doc. #232.

Davis was not just a Defendant, he was also a cross-claimant. The Court holds that as a cross-claimant, the former Davis Class should be allowed to move for substitution. The interests of the Davis Class outlive Mr. Davis. The Court takes judicial notice of the fact that a voter who goes to the trouble of casting an absentee ballot would like to have that ballot counted even if it lacks notarization or the signature of two witnesses.

2. This Court finds that the Defendant Class meets the four prerequisites for a class action: (1) the class contains approximately 1700 voters therefore joinder is impracticable; (2) there are questions of law and fact common to the class; (3) the claims and defenses of Mr. Hellums are typical of the claims and defenses of such 1700 other voters; and (4) Mr. Hellums will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). Plaintiffs and the State of Alabama both raised concerns about the Davis class counsel at the hearing on the above-listed

Motions on August 21, 1995. Both parties argued that the fact that Davis's counsel did not become aware of Davis's death until approximately eight (8) months after the event raises questions as to said counsel's ability to adequately protect the interests of the class. However, the Davis Class counsel has shown that it will doggedly litigate for the rights of the voters whose ballots are in question. Therefore, the Court finds that Davis Class counsel will adequately protect the interests of the class.

The Court **GRANTS** the Motion to Substitute and the Motion to Certify Class filed by Defendant Davis Class, now Hellums Class. The Court **DENIES** Plaintiffs' Motion to Strike and Defendant State of Alabama's Motion to Dismiss.

DONE this 28th day of August, 1995.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing on all counsel of record by U.S. mail, postage prepaid on this the 11 day of September, 1995.

Albert L. Jordan
B. Glenn Murdock
Wallace, Jordan, Ratliff,
Byers & Brandt
2000A SouthBridge Parkway, Ste. 525
Birmingham, AL 35209

Joseph S. Johnston
J. Michael Druhan, Jr.
Johnston, Wilkins & Druhan
Post Office Box 154
Mobile, AL 36601

Algert S. Agricola, Jr.
111 Washington Ave.
Montgomery, AL 36104

Wlliam H. Pryor
Deputy Attorney General
Office of the Attorney General
Alabama State House
11 South Union Street
Montgomery, AL 36130

James C. Wood
Simon, Wood & Crane
103 Dauphin Street, Ste. 1010
Mobile, AL 36602

Henry Sanders
Chestnut, Sanders, Sanders & Pettway
P.O. Box 1305
Selma, AL 36702

David A. Boyett, III
Hamilton, Butler, Riddick,
Tarlton & Sullivan, P. C.
P.O. Box 1743
Mobile, AL 36633

John Hollis Jackson, Jr.
500 2nd Ave. So.
P.O. Box 1818
Clanton, AL 35045

Elisha C. Poole
Poole & Poole
P.O. Box 308
Greenville, AL 36037

Jack Lee Roberts, Jr.
James E. Turnbach
Turnbach & Warren, P. C.
200 Chestnut St., Ste. A
Gadsden, AL 35902-0129

Robert A. Wills
Wills and Simon
P.O. Box 547
Bay Minette, AL 36507

Booker Forte
P.O. Box 147
Tuscaloosa, AL 45403

James W. Webb
Bart Harmon
Webb & Eley, P.C.
166 Commerce St., Ste. 300
Montgomery, AL 36101

Kenneth A. Dowdy
Legal Advisor to the Secretary of State
Deputy Attorney General
Office of the Secretary of State
State Capitol
600 Dexter Avenue
Montgomery, AL 36130

Joe R. Whatley, Jr.